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FEDERAL COURT PROCEDURE

Artis v. District of Columbia, --- U.S. --- (2018), Decided January 22, 2018

FACTS: Artis, a District of Columbia public employee, was terminated. She filed suit under federal law for employment discrimination, and also filed several allied claims under D.C. law. On June 27, 2014, the District Court gave the District of Columbia summary judgement on the sole federal claim, and declined to exercise any jurisdiction over the remaining state-law claims.[1] The federal court, at that time, noted that 28 U.S.C. 1367(d) provided that state law claims were tolled for the duration of the federal litigation and 30 days beyond.

Artis refiled her state law claims in the appropriate local court 59 days later. DC moved to dismiss, arguing the claim was time-barred and was filed 29 days too late. At the time Artis had first filed in state court, nearly two years remained on the three-year statute of limitation for such claims, but two and a half years passed because the U.S. District Court relinquished the claim back to the state court. The DC court rejected Artis's claim that 1367 should be read to "stop-the clock" on the state claims, and that she could have continued to litigate in state court while the federal claims were proceeding. The D.C. Circuit Court of Appeals affirmed, but noted that there were "competing approaches" to interpreting the federal statute in the federal courts – the "stop-the-clock reading and the grace-period reading." It concluded that the grade-period approach (which allowed 30 days to refiled following federal court dismissal) better suited the process.

Artis petitioned for certiorari and the U.S. Supreme Court granted review.

ISSUE: Unless a federal statute says otherwise, if a federal claim is dismissed and the case remanded to state court, does the federal law apply the "stop-the-clock" or "grace period" method of calculating the time to refile in state court?

HOLDING: The "stop-the-clock" method

DISCUSSION: The Court began by noting that "statutes that shelter from time bars claims earlier commenced in another forum generally employ one of two means." The first will be that the state law statute of limitations may be tolled, or paused' while the claim is pending in the other court. Under that reading, the state court statute of limitations would have been suspended, and would then pick back up where it left off when the federal claim was dismissed. The Court noted that in precedent, it had applied that rule in several cases that had reached the high court.

[1] Although the District of Columbia is, of course, not a state, for the purposes of this type of litigation, its laws are considered to be analogous to state law.

The alternative method would provide a "grace period." The state court statute of limitations would continue to run, and ultimately expire, but the plaintiff would be given a fixed period of time following the termination of the active case to refile the action. Some federal statutes specifically provide for that to be the case, in fact. The Court engaged in an extended discussion of the meaning of the word "toll" as used in the statute, as well as the phrase "period of limitations." The Court noted a particular absurdity, as it could be interpreted to allow a plaintiff to refile in state court even if the original limitations period had expired, before the case was filed in federal court.

The Court agreed that "the District's interpretation maps poorly onto the language of 1367(d) while Artis' interpretation is a natural fit." Instead, the Court agreed, the mention of 30 days to refile would prove useful when the "federal action is commenced close to the expiration date of the relevant state statute of limitations" – giving the plaintiff, in effect, "breathing space to refile in state court." Adding this brief span, in addition to the statute of limitations, was not unusual in federal statutes, it noted.

The Court explored the background of the purpose for the federal law in question. It noted that "with tolling available, a plaintiff disinclined to litigate simultaneously in two forums is no longer impelled to choose between forgoing either her federal claims or her state claims." The court noted that if the District's position was allowed to prevail, "cautious plaintiffs would surely take up the D.C. Superior Court's suggestion" and pursue active litigation in both fora at the same time. The Court asked "How it genuinely advances federalism concerns to drive plaintiffs to resort to wasteful, inefficient duplication to preserve their state-law claims is far from apparent" and it would work against the preferred judicial efficiency.

The Court agreed that a "stop-the-clock rules is suited to the primary purposes of limitations statutes: 'preventing surprises' to defendants and 'barring a plaintiff who has slept on his rights.'"[2] When this particular statute applies, the court noted, the defendant employer "will have notice of the plaintiff's claims" – by virtue of having responded to the federal claims – "within the state-prescribed limitations period." As such, the defendant would not be "surprised," either by an unexpected claim.

The Court reversed the judgement of the D.C. Court of Appeals and the case remanded.

NOTE: *Although this is a procedural case, involving a specific federal statute, it is relevant to law enforcement agencies as it is common for both federal and state law claims to be pursued in cases with law enforcement as the defendant. In some cases, the elements and the defenses for the state law claims may be different than those that apply in federal court. As such, agencies should remain aware of the possibility of a renewed state court lawsuit should the federal court decline to exercise jurisdiction over those claims.*

[2] American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).

42 U.S.C. §1983 – FOURTH AMENDMENT

<u>District of Columbia v. Wesby</u>, --- U.S. --- (2018), Decided January 22, 2018

FACTS: On March 16, 2008, members of the District of Columbia Metropolitan PD responded to a complaint of loud music and illegal activities at a vacant home. One of those calling was a respected neighborhood representative. Upon arrival, neighbors confirmed the house was supposed to be empty. When officers knocked, a man looked out a window near the door and dashed upstairs. Another partygoer opened the door, admitting the officers. The officers could observe that the house looked like a vacant property, and they smelled marijuana and saw alcoholic beverages. The house did have electricity and working plumbing, but no furniture in sight beyond a few metal chairs. During the investigation, they discovered there was food in the refrigerator and toiletries in the bathroom.

Among the activities going on downstairs was a "makeshift" strip performance, with scantily-clad women dancing and receiving cash. Upstairs, officers found a mattress on the floor, the only one in the house, and used condom wrappers scattered about. One partygoer was hiding in the closet and another had locked himself in the bathroom. A total of 21 people were in the house. Upon being questioned, those individuals gave neither a clear nor a consistent story of what was going on – but several claimed a woman was "renting the house" and had given them permission to be there. The woman was identified only by a nickname (Peaches) and was not present. They were able to reach her on the phone but she said she'd left to go to the store and would not return as she feared being arrested. She also gave an unclear explanation as to her rights to the house, and hung up. After a second and then third call, she finally admitted she did not have permission to be there.

Officers were able to reach the property owner, who stated that he had not finalized any arrangements with the women and that no one had permission to be there, let alone to be having a party there. All of the individuals were arrested, originally for unlawful entry, but the charges were amended to disorderly conduct. Ultimately, even those the charges were dropped.

16 of the 21 partygoers filed suit, under 42 U.S.C. §1983, claiming false arrest under the Fourth Amendment. The District Court ruled in favor of the 16 partygoers. The D.C. Circuit upheld that decision. The City and the officers petitioned for certiorari and the U.S. Supreme Court granted review.

ISSUE: May officers be held liable for making an arrest upon reasonable facts that a crime is being committed, even if it is later determined that arrest was incorrect?

HOLDING: Yes

DISCUSSION: The Court began, noting that "a warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer's presence."[3] To determine probable cause, the Court agreed it must look at the events that led up to the arrest and determine if "viewed from the standpoint of an objectively reasonable police officer," probable cause was satisfied.

The Court detailed the facts known to the officers. They had been told by several credible neighbors that the house was vacant. The house was essentially bare. The utilities were on but that wasn't unusual if the house was vacant for only a short time or due to be rented soon. There was nothing inside, such as boxes, to indicate anyone was moving into the house. Looking at the conduct of the partygoers, several of whom fled upon the arrival of the officers, it was reasonable for the officers to make "common-sense conclusions about human behavior." Homeowners, as a rule, do not "live in near-barren houses," allow their homes to be used as strip clubs and leave their homes in a filthy condition. As such, it was reasonable to infer that the partygoers knew that their presence there was unauthorized, especially since "many scattered" when the officers arrived. "Unprovoked flight" is, it agreed, a strong indication of wrongdoing.[4] When questioned, the partygoers gave "vague and implausible responses," as well, with only two claiming they were invited specifically by Peaches, whom they knew only by her nickname, and they were "working the party instead of attending it." None of the actual partygoers knew the name of the supposed "hostess" and some claimed it was a bachelor party – but no bachelor was identified. When they spoke to Peaches, she was "nervous, agitated and evasive" and ultimately she admitted she had lied about her right to be there.

Viewed as a whole, it was certainly reasonable, the Court decided, for an officer "to conclude that there was probable cause to believe the partygoers knew they did not have permission to be in the house." The lower courts, the Court noted, "engaged in an 'excessively technical discussion' of the factors supporting probable cause." Those courts took the facts in isolation, rather than looking at the totality of the circumstances. Court precedent recognized "that the whole is often greater than the sum of its parts – especially when the parts are viewed in isolation."[5] Although the facts, each standing alone, could be said to not satisfy probable cause, the requirement to look at the totality "precludes this sort of divide-and-conquer analysis." Even though most of the actions were "innocent," the Court noted that officers were not required to accept it in the light of a "substantial chance of criminal activity."

The Court reversed the D.C. Circuit, and held that the officers did have probable cause to make the arrests. As such, the District and the officers were entitled to summary judgement.
Although that was sufficient to resolve the matter, the Court elected to take another step, to specifically address the error "on both the merits of the constitutional claim and the question of qualified immunity." The Court elected to do so because the appellate court's analysis, if followed elsewhere, might undermine similar cases involving qualified immunity.

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[3] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).
[4] Illinois v. Wardlow, 528 U.S. 119 (2000).
[5] U.S. v. Arvizu, 534 U.S. 266 (2002).

The Court noted that officers are entitled to qualified immunity unless they violated a federal statutory or constitutional right and the unlawfulness of the actions they took was "clearly established at the time."[6] That is a high standard and requires that the law on an issue was sufficiently clear that an officer would understand the unlawfulness of their conduct. The underlying legal principle must be "settled law"[7] and such that every reasonable official would know. "The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[8] It must be highly specific, not general.[9] Specificity is "especially important in the Fourth Amendment context."[10] "Given the imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in 'the precise situation encountered."[11] It is necessary, therefore "to identify a case where an officer acting under similar circumstances … was held to have violated the Fourth Amendment.[12] It requires, in most cases, a "body of relevant case law."

In this situation, the Court agreed, the circumstances made it reasonable for the officers to make the arrests, as they had probable cause, even if the officers were possibly mistaken. There was certainly no settled law to the contrary. Nothing required the officers to accept without question the assertions of the partygoers, and precendent agreed that "officers are not required to take a suspect's innocent explanation at face value." Looking at the "entire legal landscape," the officers reasonably had probable cause.

The D.C. Circuit was reversed and the case was remanded.

42 U.S.C. §1983 – FORCE

Kisela v. Hughes, --- U.S. --- (2018), Decided April 2, 2018

FACTS: In May, 2010, a neighbor called 911 to report that a "woman was hacking a tree with a kitchen knife." Officers Kisela and Garcia were dispatched to the scene. The caller flagged them down, gave them a description of the woman and described erratic behavior. Officer Kunz arrived on her bicycle.

Officer Garcia spotted a woman, Chadwick, standing next to a car in a driveway, but a fence with a locked gate separated the officer from the woman. Another woman (Hughes) emerged from the house "carrying a large knife at her side." Hughes met the description of the erratic subject and walked toward Chadwick, stopping no more than six feet away from her. All three officers drew their pistols and Hughes was ordered to drop the knife. Chadwick said "take it easy" to both Hughes and the three officers. "Hughes appeared calm but she did not acknowledge the officers'

[6] Reichle v. Howards, 566 U.S. --- (2012).
[7] Hunter v. Bryant, 502 U.S. 224 (1991).
[8] Saucier v. Katz, 533 U.S. 194 (2001).
[9] Plumhoff v. Rickard, 572 U.S. --- (2014).
[10] Mullenix v. Luna, 577 U.S. --- (2015).
[11] Ziglar v. Abbasi, 582 U.S. --- (2017).
[12] White v. Pauly, 580 U.S. --- (2017).

presence or drop the knife. Kisela dropped to the ground to get a better line of sight and shot Hughes through the fence. The officers went over the fence and secured the injured Hughes. She was transported and treated; she survived. Less than a minute elapsed between the time the officers saw Chadwick and Kisela fired.

Later, all three officers indicated that they "subjectively believed" Hughes was a threat to Chadwick. They learned later that the two were roommates and that Chadwick was upset over a small debt. Shortly before the shooting, Hughes had been threatening Chadwick's dog with the knife. Chadwick was going to her car to get the money for the debt when the police arrived. Chadwick swore in an affidavit that she did not feel endangered.

Hughes filed suit against Kisela under 42 U.S.C. §1983, claiming excessive force. The District Court ruled in favor of Kisela but the Ninth Circuit Court of Appeals reversed that, ruling that the evidence "was sufficient to demonstrate that Kisela violated the Fourth Amendment" and that it was clearly established that the shooting was improper.

Kisela requested review and the U.S. Supreme Court granted certiorari.

ISSUE: Is an officer entitled to qualified immunity if the law is not clearly established?

HOLDING: Yes

DISCUSSION: The Court looked back to the seminal case of Tennessee v. Garner,[13] in which it was held ""[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, itis not constitutionally unreasonable to prevent escape by using deadly force." In Graham v. Connor,[14] the Court noted that the evaluation of the case "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." And, the Court continued, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

In this case, the Court agreed, it did not need to "decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least

[13] 471 U.S. 1 (1985).
[14] 490 U.S. 386 (1989).

entitled to qualified immunity." For the law to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate."[15]

The Courted noted that "Kisela had mere seconds to assess the potential danger to Chadwick." It was clearly not incorrect to use deadly force to protect a third party (Chadwick) in the circumstances before the officers. The Court discounted the case law relied upon by the Ninth Circuit, reversed its decision and ruled that Kisela was entitled to qualified immunity.

SEARCH & SEIZURE – VEHICLE SEARCH

Byrd v. U.S., --- U.S. --- (2018), Decided May 14, 2018

FACTS: In September, 2014, Pennsylvania State Police troopers made a traffic stop of Byrd, the sole occupant of a rental car. Trooper Long, who made the stop, later indicated he was suspicious of the way Byrd was driving. Byrd was visibly nervous and was found not to be an authorized driver of the rental car he was operating. Later investigation indicated that another individual had served as, in effect, a straw renter, and have given the keys to Byrd as soon as it was rented. During the investigation, they discovered an out of state warrant, but that state refused to extradite. Byrd admitted there was marijuana in the car. The troopers at the scene attempted to get consent, but agreed that since he was not an authorized driver, he had no expectation of privacy in the vehicle. Upon a search, 49 bricks of heroin and body armor were found in the trunk.

Byrd moved to suppress the fruits of the trunk search. Trooper Long also argued at the suppression hearing that the search was also justified under the vehicle exception doctrine, but the trial court ruled that Byrd lacked standing to object, as he had no expectation of privacy, and did not reach that issue. Byrd took a conditional guilty plea and appealed. The Court of Appeals upheld his plea based on Byrd being an unauthorized driver and did not address the second justification.

Byrd petitioned for certiorari and the U.S. Supreme Court granted review.

ISSUE: May an unauthorized driver in a rental vehicle still have an expectation of privacy in that vehicle?

HOLDING: Yes

DISCUSSION: The Court acknowledged that "there is a diminished expectation of privacy in automobiles, which often permits officers to dispense with obtaining a warrant before conducting a lawful search."[16] The Court summed up the precise question as: "Does a driver of a rental car have a reasonable expectation of privacy in the car when he or she is not listed as an authorized driver on the rental agreement?" Although an owner would always have that right,

[15] White v. Pauly, 580 U.S. --- (2017).
[16] California v. Acevedo, 500 U. S. 565 (1991).

"a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it."[17] Simple presence isn't enough, however, to convey that right. The Court made a distinction between passengers, who may lack that right depending upon the circumstances, and sole occupant drivers.

Continuing:

> The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it, much as it did not seem to matter whether the friend of the defendant in Jones owned or leased the apartment he permitted the defendant to use in his absence. Both would have the expectation of privacy that comes with the right to exclude.

The Court agreed that in Rakas, it had agreed that the "'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search."[18] The Government had argued that since Byrd knew he could not lawfully rent the vehicle on his own based on his criminal record, so he may have committed a crime by using another person to do so. However, the Government's argument was not made at the lower courts and, as such, could not be considered for the first time on appeal.

The Court noted, also, that the Government did argue that the troopers had probable cause to believe that the vehicle contained contraband, based on Byrd's admission of having marijuana. The Court agreed that was proper for the District Court to address, and remanded the case with the ruling that Byrd did have a reasonable expectation of privacy and thus standing to contest the search.

FOURTH AMENDMENT

Collins v. Virginia, --- U.S. --- (2018), Decided May 29, 2018

FACTS: Officer McCall (Albemarle County, VA, PD) observed a distinctive motorcycle commit a traffic violation. The driver avoided the officer's attempt to stop him. A few weeks later, Officer Rhodes saw a similar motorcycle speeding, but he also lost him. The officers agreed that it was the same motorcycle. They determined it was likely stolen, and that Collins had possession of it. Collins' Facebook account included a photo of what appeared to be the same motorcycle at the top of a driveway. Further investigation indicated that the home was Collins' girlfriend,

[1717] See Jones v. U.S., 362 U. S. 257 (1960) Mancusi v. DeForte, 392 U. S. 364 (1968); Minnesota v. Olson, 495 U. S. 91 (1990).

[18] Rakas v. Illinois, 439 U.S. 128 (1978).

and that he stayed them a few nights a week. (Virginia did not dispute that Collins had an expectation of privacy, and standing, at the house.[19])

Officer Rhodes observed what appeared to be a motorcycle, with an extended frame, covered with a tarp. It was "at the same angle and in the same location" as indicated in the Facebook photo. Officer Rhodes walked toward the house, took a photo of the motorcycle from the driveway, and then walked up the driveway. He pulled back the tarp, finding a motorcycle that appeared to be the suspect vehicle. Officer Rhodes ran the license plate and VIN, and confirmed it was stolen. He photographed and replaced the tarp, and returned to his car. When Collins arrived soon thereafter, Officer Rhodes approached the house and knocked. Collins admitted that the motorcycle was his and that he'd bought it without title. He was then placed under arrest.

Collins was indicted for receiving stolen property. He moved to suppress the evidence obtained when Rhodes removed the tarp and, in effect, searched the motorcycle. The trial court denied his motion and he was convicted, which was affirmed by the Virginia appellate courts, but the Virginia Supreme Court affirmed on the basis of the "automobile exception" rather than the exigency argument used by the lower courts. It found Officer Rhodes had probable cause to believe the motorcycle was contraband, and that the warrantless search was justified.

Collins petitioned for certiorari, and the U.S. Supreme Court granted review.

ISSUE: Does the "automobile exception" justify an entry into the curtilage to obtain evidence?

HOLDING: No

DISCUSSION: The Court began:

> This case arises at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home.

The Court reviewed the "so-called automobile exception in Carroll v. U.S.[20]" The exception is justified by the "ready mobility" of vehicles.[21] Additional justification evolved "based on 'the pervasive regulation of vehicles capable of traveling on the public highways.'" The Court emphasized that the rationale behind the doctrine "applied only to automobiles and not to houses, and therefore supported "treating automobiles differently from houses" as a constitutional matter."[22]

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[19] Minnesota v. Olson, 495 U. S. 91 (1990).
[20] 267 U. S. 132 (1925).
[21] California v. Carney, 471 U. S. 386 (1985) (citing, e.g., Cooper v. California, 386 U. S. 58 (1967); Chambers v. Maroney, 399 U. S. 42 (1970)).
[22] Cady v. Dombrowski, 413 U. S. 433 (1973).

Moving to curtilage, the Court noted that ""[W]hen it comes to the Fourth Amendment, the home is first among equals."[23] Further, curtilage "the area 'immediately surrounding and associated with the home'"—to be "'part of the home itself for Fourth Amendment purposes.'" As such, when an officer "physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct thus is presumptively unreasonable absent a warrant."

The Court reviewed how the motorcycle was positioned at the house. The Court agreed that part of the driveway, which was partial enclosed at that point, was certainly within the curtilage. As such, the question is, whether the automobile exception justified that invasion. The Court agreed it did not, as such exception is also premised on the requirement that the vehicle in question be in a public place. Nothing in the case law gave the officer the right to enter to curtilage to access the suspect vehicle. The court equated it, for example, to Payton, which denotes that "absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause."[24] "Likewise, searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage."

The Court continued:

> As noted, the rationales underlying the automobile exception are specific to the nature of a vehicle and the ways in which it is distinct from a house. The rationales thus take account only of the balance between the intrusion on an individual's Fourth Amendment interest in his vehicle and the governmental interests in an expedient search of that vehicle; they do not account for the distinct privacy interest in one's home or curtilage. To allow an officer to rely on the automobile exception to gain entry into a house or its curtilage for the purpose of conducting a vehicle search would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application. Indeed, its name alone should make all this clear enough: It is, after all, an exception for automobiles.

The Court disagreed with arguments put forth by Virginia, and noted that "the ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible."[25] A partially enclosed carport, for example, is curtilage, just like an enclosed garage. It would also provide rights to those who can afford garages over those without resources to

[23] Florida v. Jardines, 569 U. S. 1 (2013).
[24] Payton v. New York, 445 U. S. 573 (1980).
[25] California v. Ciraolo, 476 U. S. 207 (1986).

have such an enclosed structure. It agreed that " the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion"[26].

The Court concluded that the "automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein."

The Court reversed the judgement of the Supreme Court of Virginia and remanded the case. The Court noted, however, that it left open the question that the officer's "warrantless intrusion on the curtilage of Collins' house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement."

FIRST AMENDMENT

Lozman v. City of Riviera Beach, Florida, --- U.S. --- (2018), Decided June 18, 2018

FACTS: In 2006, Lozman became a resident on a "floating home" in Riviera Beach, Florida, having docked the structure in the city-owned marina. He soon developed a "contentious relationship" with the City, as he became an "outspoken critic" of the City's development plans for the waterfront. He spoke often during public meetings and filed a lawsuit against the City on an open records claim.

In June 2006, the Council held a closed door session to discuss Lozman's lawsuit. Pursuant to a transcript of that meeting, it was suggested the City "use its resources to 'intimidate' Lozman" and others involved in litigation. Other councilmembers agreed, although there was dispute as to whether they actually planned to intimidate Lozman or simply aggressively respond to the litigation.

Subsequently Lozman "became embroiled in a number of disputes" which he claimed were part of the City's plan to retaliate against him. In November 2006, he spoke at a public meeting and was told to "stop making" remarks. He continued to speak. A council member called for the police officer present to remove Lozman from the podium. When Lozman still refused, the officer was told to "carry him out;" the officer handcuffed Lozman and escorted him out. Lozman was arrested for failure to follow the rules "by discussing issues unrelated to the city" and then refusing to leave. Lozman claimed the arrest was in retaliation for his public speaking. Ultimately, the criminal case was dismissed although the prosecutor agreed there was probable cause for the arrest under Florida law.

Lozman filed suit under 42 U.S.C. §1983. He described a number of alleged incidents that he claimed showed the City's intent to harass him, including a case involving his floating home that went to the U.S. Supreme Court in 2013 which Lozman won. Ultimately, the trial court returned a verdict for the City. Lozman appealed only the issue of the "alleged retaliatory arrest" at the November 2006 city council meeting. The Eleventh Circuit upheld the verdict for the City.

[26] See U.S. v. Ross, 456 U. S. 798 (1982)

Lozman requested certiorari and the U.S. Supreme Court granted review.

ISSUE: May a case be pursued for a retaliatory arrest under the First Amendment even if probable cause for the arrest exists?

HOLDING: Yes

DISCUSSION: Lozman did not challenge the underlying criminal statute under which he was charged or the ability of the City Council to limit speech at its events. However, he did challenge the lawfulness of his arrest although he conceded there was probable cause under the statute for it – as he did refuse to leave the podium once he was ordered to do so. He contended, however, that the arrest was in retaliation for his public speaking, which was protected activity.

The Court agreed that a lawsuit against the City required that the harm be connected to an "official municipal policy."[27] The central point, however, it identified was whether the concession of probable cause for the arrest "bars recovery regardless of any intent or purpose to retaliate for past speech." The Court looked to Mt. Healthy City Bd. Of Ed. v. Doyle[28], a civil case, and Hartman v. Moore.[29] The Court agreed that difficult questions arise "about the scope of First Amendment protections when speech is made in connection with, or contemporaneously to, criminal activity." Lozman did not sue the officer who made the arrest, who appeared to have acted in good faith, and there was no evidence the officer knew of the prior issues. The Court agreed that an "official retaliatory policy "is a particularly troubling and potent form of retaliation." In such cases, the "government itself orchestrates the retaliation." The Court agreed that Lozman's speech was "high in the hierarchy of First Amendment values."

The Court ruled that Lozman did not need to "prove the absence of probable cause to maintain a claim of retaliatory arrest against the City." The Court did not render an opinion as to whether Lozman might ultimately be successful in his lawsuit, but reversed the Court of Appeals and remanded the case for further proceedings.

FOURTH AMENDMENT

Carpenter v. U.S., --- U.S. --- (2018), Decided June 22, 2018

FACTS: In the spring and summer of 2011, police apprehended four men accused of armed robberies in the Detroit area. One of the accused gave his own cellphone number to the FBI, as well as those of other participants. Call records were used to identify "still more numbers" of possible conspirators. The FBI applied for three orders to request "transactional records" for 16 numbers, from various wireless carriers. The accounts for Carpenter and Sanders were among

[27] Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978).
[28] 429 U.S. 274 (1977).
[29] 547 U.S. 250 (2006).

those requested. The warrants were issued under the Stored Communications Act, 18 U.S.C. 2703(d), which allows such disclosure when the evidence provides reasonable grounds that the information would be "relevant and material to an ongoing criminal investigation." Using that information, gathered through an analysis of 127 days of back data, the conspirators were able to be localized to the area of each robbery, in varying levels of precision.

Carpenter and Sanders were charged with interstate robbery. They moved to suppress the cell-site evidence, claiming that probable cause was required for the disclosure. The District Court denied the motion. Both men were tried, and the cell site data for the two men was presented, with an agent testifying how the records indicated that both phones were in close proximity to the location of each robbery, at the time it occurred.

Both men were convicted, and appealed. The U.S. Sixth Circuit agreed that the federal courts have long made a distinction between the "content" of a personal communication and the "information necessary to get those communications from Point A to Point B." The initial cases, of course, applied to physical mail, but the law was eventually applied to telephone calls in the same way. Federal law now accords that same protection to email and similar communications, as well.[30] However, up to this point, the courts had not yet "extended those protections to the internet analogous to envelope markings, namely the metadata used to route internet communications, like sender and recipient addresses on an email, or IP addresses." The Sixth Circuit agreed that cell-site data, much like metadata in emails, was the "envelope" rather than the contents of a communication. As such, it was entitled to lesser privacy rights.

The Sixth Circuit agreed that such locational data was not subject to any expectation of privacy.[31] Any cell phone user understands that their location is being transmitted to a tower and that the carriers keep a record of the location from which calls are being made. These records are not extremely precise, as noted by the facts of the case – in which the phones could only be placed in a ½ mile to two mile radius.

The Sixth Circuit agreed that the business records of cell phone locations are not a search under the Fourth Amendment. Carpenter requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is a search warrant required for access to cell site location information for historical data?

HOLDING: Yes

DISCUSSION: The Court began with a review of the history of the Fourth Amendment, and its beginning being tied with physical intrusions on areas in which an individual expects privacy. In modern times, however, the concept of privacy has expanded beyond physical boundaries.

[30] U.S. v. Warshak, 631 F.3d 266 (6th Cir. 2010).
[31] Smith v. Maryland, 442 U.S. 735 (1979).

When applying such principles to "innovations in surveillance modes," the Court faced a challenge to find a balance. Specifically, the court looked at Kyllo v. U.S.[32], which dealt with thermal imaging technology, and Riley v. California[33], which addressed the storage inside a cell phone. The Court acknowledged that it faced the hurdle of anticipating new technologies

The Court acknowledged that this case fell at the juncture of two Fourth Amendment doctrines: the issue of an expectation of privacy in information handed over to third parties In the first, in the past, a lesser expectation of privacy has been accorded traditionally, but "that does not mean that the Fourth Amendment falls out of the picture entirely." Although the information is provided voluntarily in one sense, the use of cell phones has become so pervasive that "carrying one is indispensable to participation in modern society." Unless the phone is disconnected from the network, there is "no way to avoid leaving behind a trail of location data."

The Court continued with a review of the technology of cell phone and how they might be located using cell phone tower triangulation. The tremendous power available to essentially track an individual's movements, precisely, as far back as one's cell phone carrier maintains records, was difficult to imagine even a few years ago. As in the issue with Kyllo, the less-precise technology today is likely to evolve into the more precise technology tomorrow. Although at the time the Carpenter case began, it acknowledged, the location of the cell phone could only be described in fairly general terms, that technology has continued to improve in the interim and can only be expected to continue to become more and more precise.

The Court also noted that cell phones have become "almost a 'feature of human anatomy'" with research indicating that the majority of individuals "compulsively carry cell phones with them all the time." Although vehicles may be left behind, the "cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." In fact, it equated to the government attaching an ankle monitor to the user. Further, using the cell-site location information (CSLI), the police could "travel back in time to retrace a person's whereabouts," limited only by the retention cycle of the carrier. Further, officers do not even need to decide who they wish to "follow" in advance. Certainly, cell-site records are business records, held by a third-party, but the cell phone companies are "ever alert, and their memory is nearly infallible," as the companies continually, and almost casually, collected an "exhaustive chronicle of location information."
The Court concluded that in this factual scenario, law enforcement must obtain a warrant, based upon probable cause – specifically to obtain historical location data on a cell phone user. However, the Court noted that the decision was to be construed narrowly and that "real-time CSLI" of a specific user or "tower dumps" – a "download of information on all the devices that connected to a particular cell site during a particular interval – triggered different possibilities. The Court also noted that it did not "consider other collection techniques involving foreign affairs or national security." It allowed that exigent circumstances would also apply and would justify not obtaining a warrant.

[32] 533 U.S. 27 (2001).
[33] 573 U.S. 2014.

The Court reversed the Sixth Circuit Court of Appeals, and remanded the case for further proceedings.

SUSPECT IDENTIFICATION

Sexton (Warden) v. Beaudreaux, --- U.S. --- (2018), Decided June 28, 2018

FACTS: Beaudreaux shot and killed Drummond, during a 2006 argument. Escho and Crowder were witnesses. Crowder stated he knew the shooter from middle school but did not know his name, while Esho could also describe, but did not know, the shoter. Crowder, when in custody months later, was shown a middle school yearbook, as well as a photo lineup, that included Beaudreaux. Crowder identified him as the shooter. Esho was interviewed and shown a photo array with a recent picture, and he tentatively identified him. When shown a photo taken closer to the crime, in a separate array, he picked out Beaudreaux as "very close" – but refused to identify him positively. He said he needed to see him in person to be sure at at a preliminary hearing, he did positively identify him based upon the way he walked.

Both men testified and identified Beaudreaux at trial. He was convicted, and his conviction affirmed through the state court system. In the federal system, he argued that his attorney was ineffective in that he did not object to the introduction of Esho's identification testimony. Eventually, the Ninth Circuit Court of Appeals reversed his conviction, determining that the attorney should have objected as the identification was "unduly suggestive," because Beaudreaux's photo was in both array, albeit different photos.

The State of California petition for certiorari and the U.S. Supreme Court granted review.

ISSUE: Is the reliability of a suspect identification a case-by-case evaluation?

HOLDING: Yes

DISCUSSION: Although this case was decided on "ineffective assistance of counsel," grounds, the Court address the proper approach to use when suppression of an eyewitness identification is "tainted by police arrangement."[34] In particular, the Court has said that "due process concerns arise only when law enforcement officers use[d] an identification procedure that is *both* suggestive and unnecessary."[35] To be "'impermissibly suggestive,'" the procedure must "'give rise to a very substantial likelihood of irreparable misidentification.'"[36] Although the process need not be ideal, an error will not necessarily mandate suppression. The trial courts are expected to assess the matter on a case-by-case basis, to determine if it could have led to a"substantial likelihood of misidentification."

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[34] Perry v. New Hampshire, 565 U.S. 228 (2012).
[35] *Id.*, at 238–239 (citing Manson v. Braithwaite, 432 U. S. 98 (1977), and Neil v. Biggers, 409 U. S. 188 (1972).
[36] Id., at 197 (quoting *Simmons* v. *U.S*, 390 U. S. 377 (1968)).

The question will center on the reliability of the identification, including: “the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” Reviewing the record on Esho’s identification, it was objectively reasonable to find he made a reliable identification.

The Court reversed the Ninth’s Circuit’s ruling and remanded the case for further proceedings consistent with its decision.